No. ~~926~~ 46

In The
Supreme Court Of The United States

OCTOBER TERM, 1940

E. V. PARKER, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

v.

MOTOR BOAT SALES, INCORPORATED

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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TABLE OF CONTENTS

PAGE

Opinion of the Court Below 3
Jurisdiction 4
Statement of Case 4
Decedent's Contract of Employment and Duties 5
Business of Employer Local and Employees–Non-Maritime ... 5
Facts Relating to Decedent's Drowning 5
Decedent's Violation of Contract of Employment, Instructions and Duties 6
Evidence 6
Decedent's Duties 10
History of Claim and Suit 12
Argument 12
Want of Jurisdiction 12
Law 14
The 'Maritime But Local' Doctrine 14
This Court Has Decided Adversely to Petitioner's Contentions 22

TABLE OF CASES

PAGE

Alaska Packers Asso. v. Industrial Accident Com. 276 U. S. 467, 48 S. Ct. 346, 72 L. Ed. 656 19-36
Ayers v. Hoage 63 Fed. (2d) 364 29
American Ry. Co. v. Birch 244 U. S. 547, 56 L. Ed. 879 42
Brown v. Fletcher 210 U. S. 82, 52 L. Ed. 966 42
Crowell v. Benson 285 U. S. 22, 75 L. Ed. 598 17-22
Chapman et al. v. Griffith's Consumers Co. 107 Fed. (2) 263 at p. 267 41
Chicago R. I. & P. R. Co. v. Schendel 270 U. S. 611 42
DeWald v. Baltimore & Ohio R. R. Co. 4 Cir. 71 Fed. (2d) 810 27
DeFillippis v. Falkenberg 170 App. Div. 153, 155 N. Y. S. 761, 219 N. Y. 581, 114 N. E. 1064 30
Dennison v. Payne 293 Fed. 393 42
Edelweiss Gardens v. Industrial Co. 125 N. E. 260 30
Edwards v. Elliott 21 Wall. 532, 22 L. Ed. 487 34
Fidelity Cas. Co. of N. Y. v. Burris, 59 Fed. (2d) 1042 at 1043 21
Fazio v. Cardillo (1940) 109 Fed. (2d) 835 29

Ferry Co. v. Beers 20 How. 393, 15 L. Ed. 961.....34
Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469, 66 L. Ed. 321, 42 Sup. Ct. Rep. 157.....15-19
Hartford Accident & Indemnity Co. v. Cardillo (1940) 112 Fed. (2d) 11.....32
Interstate Commerce Com. v. Louisville R. R. Co. 227 U. S. 91-92, 33 S. Ct. 185.....22
Ingersoll v. Coran 211 U. S. 335, 53 L. Ed. 208.....42
Jeffers v. Foundation Co. 85 Fed. (2d) 24.....28
Lake Gorin Employers Liability Assurance Co. of London v. Cook, 266 U. S. 449, 69 L. Ed. 372, 45 Sup. C. Rep. 157...17
Leonbruno v. Chapman Silk Mills 229 N. Y. 470, 128 N. E. 711.....29
Motor Boat Sales, Inc. v. Parker 116 Fed. (2d) 789-796.... 3
Massman Const. v. Bassett, Dep. Comr, et als. (1940) 30 Fed. Supp. 813.....26
Millers Indemnity Underwriters v. Brand 270 U. S. 59 46 S. Ct. 194, 70 L. Ed. 470.....28
Morgan v. Hoage 72 Fed. (2d) 727.....30
McNicol, In re 102 N. E. 697.....31
Robertson v. Cease, 1878, 97 U. S. 646, 24 L. Ed. 1057.....18
Roach v. Chapman 22 How. 129, 16 L. Ed. 294.....27-34
Smith, Ex parte, 1876, 94 U. S. 455, 24 L. Ed. 207.....18
Sultan Ry. Co. v. Dept. of Labor and Industries of the State of Washington, 277 U. S. 136, 48 S. Ct. 505, 72 L. Ed. 820.....19-37
South Chicago Coal & Dock Co. v. Bassett, etc. (1940) 60 Sup. Ct. Rep. 544.....26-20
Scholtzhauer v. C. & L. Lunch Co. 134 N. E. 701.....30
Troxell's, Admr. v. Del Lac. & Western Ry. Co. 227 U. S. 586, 57 L. Ed. 537.....42
U. S. Casualty Co. v. Taylor 64 Fed. (2d) 521.....28
Wimmer v. Hoage 90 Fed. (2d) 373.....30-34
Wood Towing Co. v. Parker 76 Fed. (2d) 770.....43
Young v. Duncan 218 Mass. 346, 106 N. E. 1.....35

OTHER AUTHORITIES

Robinson on Admiralty, 1939, Chap. 3 p. 76.....14
Workmen's Compensation Act, 93 Chap. 4.....14
2 C. J. S., Admiralty, p. 98 Sec. 38.....27
Compensation Act (33 USCA Sec. 802).....31

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I.

OPINION OF THE COURT BELOW

The Opinion of the Circuit Court of Appeals (R. 69-78) is reported in 116 Fed. (2d) 789-796, (R. 68-78).

II.

JURISDICTION

Petitioner invokes the jurisdiction of this Court to review the judgment of the United States Circuit Court of Appeals rendered January 6, 1941, under section 240 (2) of the Judicial Code as amended by Act of February 13, 1925, by a petition for writ of certiorari filed by the Solicitor General of the United States solely on behalf of E. V. Parker, a Deputy Commissioner of the United States Compensation Commission, praying for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals of the Fourth Circuit reported in Fed. (2d) 789-796, R. 78-79.

STATEMENT OF CASE

The respondent was a city retail merchant, operating its store at 3 West Grace Street, in Richmond, Virginia, and was engaged in selling outboard motors, small boats—none larger than the yacht class,—and maritime supplies of all kinds to cover the boats it handled (R. 20-21, 28-31, 49-51). Respondent did not service boats or do installation or repair work on boats or engines on navigable waters, the boats it sold to its customers being fully equipped and ready to go (R. 23, 24-25, 37-38, 41).

DECEDENT'S CONTRACT OF EMPLOYMENT AND DUTIES

The decedent was **"employed as a janitor and handy-man"** (Petition 3, R. 7) **and he was specifically "instructed not to go on boats" * * *, ride on boats, or perform any duties on navigable waters or any other kind of rivers,"** (R. 24, 28-31, 34-35, 36-39, 41-42, 45, 49-50). He was not employed "in maritime."

BUSINESS OF EMPLOYER LOCAL AND EMPLOYEES—NON-MARITIME

George W. Todd and Randolph Hobbs were the assistant managers of respondent's store (R. 20); W. Earl Lloyd was its mechanic and had charge of the shop (R. 28); Johnny Cooper was the mechanic's (Lloyd's) helper (R. 29, 30, 31, 37), and worked under him. Randolph Hobbs, on August 8, 1938, was in charge of the store (R. 34).

FACTS RELATING TO DECEDENT'S DROWNING

On August 8, 1938, Crown and his brother had built a "row boat" and came with it by respondent's store on their way to the James River to test it out, and talked with Hobbs, the store manager on that day, and Lloyd, the mechanic, about the purchase of one of two second-hand outboard motors from respondent. At the request of Crown it "was decided to let the motors go down to the river to be operated by him on the back of his boat" (R. 36), he having in

mind the purchase of one of them. Cooper, the mechanic's helper, was sent along to attach these motors to the Crown boat (R. 36-37). The decedent "was instructed to help lift those motors from the car (automobile) to the boat and from the boat back to the car,—to help load and unload them" (R. 22, 36-39, 40-42, 43, 46-47).

DECEDENT'S VIOLATION OF CONTRACT OF EMPLOYMENT, INSTRUCTIONS AND DUTIES

The decedent, **in violation of his contract of employment, his instructions and duties,** after he had delivered the outboard motors from the automobile to the end of the Crown boat on the bank of the river, and the motor had been attached to the end of the boat and it had been shoved into the river, voluntarily and "of his own accord" got into the front end of the boat and took the ride for his own pleasure and was sitting there with his face to the front (R., bottom 46) when the boat struck something in the muddy water, capsized, and he was drowned. He was not employed, ordered or required to get or be on the boat.

EVIDENCE

George W. Todd, a witness for claimant:
R. 21:

BY MR. PARRISH:

Q. "Who engaged the services of George P. Armistead, Jr., the deceased?"

A. "I don't know. I think he was hired by Mr. Fulton."

Q. "Mr. King Fulton, who is present today?"

A. "Yes, sir."

BY THE DEPUTY COMMISSIONER:

Q. "Are you still with the company?"

A. "Yes, sir."

Q. "You said the company engaged in dealing in maritime supplies of all kinds?"

A. "Yes, sir; to cover the boats we handle."

Q. "That means that you serviced boats?"

A. "What do you mean 'serviced boats?' "

Q. "Any kind of equipment they wanted to put on the boat, would you supply it?"

A. "No, sir; we didn't make a specialty of it. I don't know of any instance where we did installation work."

Q. "You sell the boats?"

A. "The boats we sell are ready to go."

Q. "Did you do any repair work after that?"

A. "No, sir; that was for the boat yards."

Q. "How often would your employees go aboard any boat; every day?"

A. "No sir; not every day. It was just a rarity that we got on boats. We haven't got any business getting on other people's boats."

Q. "Suppose a fellow wanted a compass or chart or some other equipment that you sell, would you deliver it?"

A. "No, sir; we don't have a delivery truck. The only thing was my car."

R. 38:

Q. "You didn't tell him what to do that day?"

A. "Not particularly that day, but George was instructed not to get on boats and he was particularly

instructed about that, but sometimes he might do some work on motors. We didn't want him working on the mechanic's work; didn't want people to see him working on motors."

Q. "He would have to get in the boat, if his job was to lift it in the boat?"

A. "Not particularly. The stern was pulled on the shore and the motor was attached to it."

BY MR. FULTON:

Q. "You said he was given specific instructions. Did he have any authority or instructions to ride on boats, perform any duties on navigable rivers, or any other kind of rivers?"

A. "No, sir."

R. 38-39:

BY MR. PARRISH:

Mr. Hobbs testified:

Q. "Generally, the purpose was for him to assist in helping to take the motors and putting them in the car from the shop and out of the car on the boat and back off the boat in the car and back to the shop?"

A. "Yes, sir."

S. King Fulton:

R. 49-50:

Q. "Did you hire this boy, George P. Armistead, Jr., who got drowned on August 8, 1938?"

A. "I did."

Q. "How long had he been with the Company?"

A. "I think since 1936 or 1937; two or two and one-half years."

Q. "What were his duties?"

A. "He was a porter. We had a porter that lived

on the premises, but when George took the job, he was married, and he did not live on the premises. He was a porter and operated under my supervision and in December 1937, at which time I went to Washington—

Q. "Were his duties ever changed? You went backward and forward."

A. "No, sir."

Q. "What instructions did you give him and other employees, generally, when they delivered things, about going in other people's boats?"

A. **"George was cautioned never to go into a boat** or have anything to do with a boat or motor, as explained by Mr. Hobbs. The class of boat we sell our customers does not demand a sale's technique. I had very rigid rules in regard to handling boats. Prior to November 1937 I laid the law down very rigidly in regard to that. I think everybody in the store knew my ruling."

Q. "What was your ruling; not to go out in rivers or boats for anybody?"

A. "Yes, sir."

BY MR. PARRISH:

Q. "When did you lay down that law? Prior to December 1937 when you went to Washington, wasn't it?"

A. "Yes, sir."

R. 51:

BY MR. FULTON:

Q. "Was he employed to work on a boat?"

A. "No, sir."

DECEDENT'S DUTIES

John Samuel Cooper:
R. 45:

BY MR. FULTON:

Q. "What were George Armistead's duties?"
A. "Wash up motors and polish them and general helper, and in the mornings, sweep in the store."
* * *
Q. "Did he have any duties in running a motor on out in the water?"
A. "Not to my knowledge."
Q. "Did you instruct him to get in the boat or did he go on his own accord, for a pleasure ride?"
A. "He went on his own accord."
Q. "You were up there when you were told to take the motor down and he went along to help unload the motors from the trailer and attach them to the boat and take them and put them back in the trailer?"
A. "Yes, sir."
Q. "And they were his sole duties?"
A. "Yes, sir."
Q. "You heard what was said to him?"
A. "Yes, sir."
Q. "You never gave him any and you didn't hear anybody give him any duties to go on water?"
A. "Not to my knowledge."

R. 46:

BY MR. FULTON:

Q. "You didn't tell him to get in the boat?"
A. "No, sir."
Q. "He had no instructions to operate the boat in the river?"

A. "No, sir."

* * *

R. 47:

BY MR. FULTON:

Q. "Did you give him any orders to sit in front?"

A. "No, sir."

Q. "There was a seat up front and he was sitting there?"

A. "Yes, sir."

Welford Earl Lloyd:
Id. R. 40—middle of page.

William Crown:
R. 41-42:

Q. "Was George Armistead told by you or by Mr. Johnnie Cooper, the boy that was from the Motor Boat Sales down, to get in your boat and ride, or was he ordered and directed not to?"

A. "Yes, sir."

Q. "Did he have any work to do on the boat?"

A. "None at all."

Q. "Were you present when he was told to go down with those motors?"

A. "Yes, sir."

Q. "And you were present when they got down there?"

A. "Yes, sir."

Q. "And you never heard anyone tell George to get in the boat and ride?"

A. "No, sir."

Q. "Was it your boat that capsized in the river when George was drowned?"

A. "Yes, sir." * * *

HISTORY OF CLAIM AND SUIT

No administrator of decedent has ever been appointed and he has never made any claim. Notice of the claim was filed by and in the name of Jessie B. Armistead, widow of decedent (R. 12-13), and not by or on behalf of the "legal representative" of decedent. The suit was brought by respondent in the United States District Court to set aside the award of the Deputy Commissioner, and Jessie Booker Armistead, the widow of decedent, and her three infant children, Dorothy Marion Armistead, George Percell Armistead, III., and William Berkley Armistead, intervened as parties defendant, and Aubrey N. Heflin was appointed guardian ad litem for the infants (R. 54). Neither they nor the "legal representative" of decedent have applied to this Court for a writ of certiorari to the judgment of the Circuit Court of Appeals. (Longshoremen's and Harbor Workers' Compensation Act, section 5).

ARGUMENT

I.

WANT OF JURISDICTION

Petitioner, under 1. and 2. and note 1, page 2, and under "Reasons For Granting the Writ," pages 7-11, contends:

That the finding of the Deputy Commissioner that the decedent was engaged in maritime employment at the time of his death is conclusive if support-

ed by substantial evidence and if the question whether decedent was engaged in maritime or local employment is one for the independent determination of the Courts, decedent's employment was maritime and not local and that recovery may not validly be provided by state law.

These contentions are untenable, because

1. The findings of the Deputy Commissioner that decedent was engaged "in maritime employment" is not supported by substantial evidence, since all the evidence shows that the decedent was not employed "in maritime" and that he had no duties to perform on navigable waters, and that when his death occurred by drowning he was at a place on James River where he had not been employed, ordered or required to go and was there in violation of both his contract of employment and specific "instructions not to go upon or work on boats on navigable or any other rivers."

On this question, the Deputy Commissioner himself found that the decedent's death resulted from drowning on the James River **"while he was employed as a janitor and handy-man." R. 7.**

That decedent was so employed is shown by all of the evidence. See pages 4-7, supra of this Brief. Decedent's contract of employment and the work he was specifically ordered to do on the day he was drowned were non-maritime. In these circumstances, even though his injury and death occurred on navigable waters, "it is, at least prima facie 'local' and within the operation of state law"—a purely local matter not concerned with commerce or navigation and not within admiralty jurisdiction.

LAW

In Robinson on Admiralty (1939, Chap. 3, p. 76), the learned author says:

> "Mere locality, therefore, is not enough to bring a case under the Longshoremen's and Harbor Workers' Act. Congress has made a statute designed to cover the job hazards of **maritime workers while laboring on the water.** The requirement is that maritime character in the work coincide with locality of the injury."

At page 93, chapter 4, Workmen's Compensation Act, the learned author says:

> "(14) State Compensation Acts may apply to maritime injury if the matter is 'maritime but local'."

Id. p. 101:

"THE 'MARITIME BUT LOCAL' DOCTRINE

> "14. The Supreme Court developed a doctrine that matters 'maritime but local' may be left to the states and by this exception many cases of maritime injury lex loci are compensable under state compensation acts. In 'local' matters uniformity is not required.
>
> "The 'local aspect of the matter has been made to depend on the **character** of the injured man's work. If the work is **maritime,** and the locus also **maritime,** the state act is excluded from operation. For non-maritime workers the state act may apply even though the place of injury is in fact on navigable waters."

"The test for the exclusion of state acts was not whether or not the injury occurred upon the maritime waters. This would be clear-cut cleavage. The Supreme Court, however, now made the simple test of mere 'locality' of no avail."

Id. pp. 103-105:

"The nub of the 'local exception' doctrine, of course, lies in the court's definition of 'local.' 'Local' does not have to do with locality; all the cases are those of an injury which is localized on the waters, not on the land. The definition has become bound up with the character of the man's work. By the mere test of locality the injury is "maritime in all the cases. This is the common factor. The character" of the work is the variant. If the work is 'maritime' the state compensation acts are excluded; if it is non-maritime, the state compensation act is applicable. The 'local' doctrine was explicitly set forth in **Grant Smith-Porter Ship Co.** v. **Rohde.** There the shipbuilder had **launched** a newly constructed ship, still in an unfinished state, undelivered and uncommissioned. But it was afloat in navigable waters when Rohde, who was at work on it as a carpenter or joiner in the builders' employ, was hurt. He sued in admiralty, alleging the shipbuilding company's negligence. The employer relied upon the State Compensation Act. By its provisions the remedy it gave was exclusive. The court said: 'The 'contract' for constructing the 'Aloha' was 'non-maritime' and although the incompleted structure was lying in navigable waters, neither Rohde's general employment nor his activities had any direct relation to navigation or commerce. Under such circumstances regulation of the rights, obligations, etc., by a local rule would not necessarily work material prejudice to

any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law.' Justice McReynolds referred to the Garcia decision and said: 'The present case is controlled by that case's principal' and 'this conclusion accords with **Southern Pacific Co.** v. **Jensen.**' Rohde's suit in admiralty failed and he was remitted to his remedy under the state compensation act. The thesis that if injury may be labeled 'local' the state law is made applicable was thus established." * * *

Id. p. 106:

"From the authorities we deduce: * * *

(3) If an injury occurs on navigable waters and in the performance of a maritime contract, it is certainly within the exclusive jurisdiction of the admiralty unless (a) the contract is of merely 'local concern'; and (b) its performance has no direct effect upon navigation or commerce; and (c) the application of the state law 'would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations.' (4) State workmen's compensation laws, contractual in character, are applicable to maritime service on navigable waters, when and only when the service is within (a), (b), and (c) above. (5) If, however, the injury occurs on navigable waters, but in the performance of a non-maritime contract, it is, at least prima facie, local and within the operation of state laws. If there are any exceptions to this rule, they are yet to be developed."

Id. pp. 107-108:

"In the **Lake Gorian, Employers' Liability Assurance Co., Limited, of London, England,** v. **Cook,** the Fifth Circuit Court of Appeals had before it the injury of a man employed by the Ford Company primarily as a mechanic assembling automobile parts, which, as they came in on Ford ships, were unloaded by the employees of the assembling plant. Cook, while engaged in unloading, was injured on board one of the ships by what the court called 'pure accident', so that unless under the State Compensation Act there was no recovery as for a maritime tore. The Circuit Court applied the State Act, saying: 'We think * * * that the matter of unloading these ships * * *at rare intervals was 'of mere local concern'."

Id. 110: At the end of note 67, it is said:

* * * "The Act does not apply to **non-maritime employment upon navigable watets.** Injuries occurring in the latter status no doubt may be validly compensated under a State law if it so provides."

Id. pp. 119-120:

"Knudson's case, **Crowell** v. **Benson,** the Supreme Court distinguished 'jurisdictional facts' and **excepted them from the administrative finality** otherwise recognized."

At page 121, the learned author under "OCCUPATIONS WITHIN THE APPLICATION OF THE HARBOR WORKERS' AND LONGSHOREMEN'S ACT," said:

"Not only must the locality be settled. The man's occupation at the time of his injury must also be determined."

And at page 122:

"The qualification is this: even though the employee is injured while engaged in work on navigable waters, his rights are to be determined under the state workmen's compensation act, if the enterprise upon which he is at the time engaged is a purely local matter and not concerned with commerce or navigation." * * *

Id. p. 123:

"In re Herbert Chief Justice Bugg for the Massachusetts Supreme Court held that the Compensation Act of the state was applicable in curious circumstances. Herbert worked on a scow, owned by the Coleman Disposal Company, and used to ferry garbage to an island two miles away in Boston Harbor. Herbert's job was to sweep the scow after its unloading, and he was at work while it tied up at the island when he fell overboard. After reciting the standard Supreme Court decisions the court said: 'It seems to us difficult to conceive of anything more local in its general nature. * * * It does not appear that the deceased had any work directly connected with maritime affairs!"

See also pp. 131-132, 174.

"There is no presumption in favor of jurisdiction. Ex parte Smith, 1876, 94 U. S. 455, 24 L. Ed. 207. It must affirmatively appear. **Robertson** v. **Cease,** 1878, 97 U. S. 646, 24 L. Ed. 1057."

> "**In Grant Smith-Porter Co.** v. **Rohde,** (1927) 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321, the proceedings was to recover an award under a Workmen's Compensation Act from a shipbuilder for injuries which a carpenter received while he was working on an unfinished vessel moored in the Willamette river (a navigable river), the court held, the **contract** for constructing the vessel was **'non-maritime,' and although the uncompleted** structure upon which the accident occurred **was lying in navigable waters, neither Rohde's general employment nor his activities at the time had any direct relation to navigation."**

This Court held, in **Alaska Packers' Association** v. **Industrial Accident Commission,** 276 U. S. 467, 48 S. Ct. 346, 72 L. Ed. 656, a person engaged by a fishing and canning Company as a seaman, also as a fisherman, **and for general work in and about a cannery,** was injured while endeavoring to push a stranded fishing boat into navigable waters for the purpose of floating it to a nearby dock. This Court held that that injury, even if within admiralty jurisdiction, was of such a "local character" as to be cognizable under a state compensation law, a ruling which would not injure the characteristic features or uniformity of the admiralty law.

Again this Court held, in **Sultan Railway Co.** v. **Department of Labor and Industries of the State of Washington,** 277 U. S. 136, 48 S. Ct. 505, 72 L. Ed. 820, an award for injuries under the Workmen's Compensation Law of Washington * * * was sustained. The plaintiff was engaged in assembling saw logs in booms for towage elsewhere for sale, and the breaking up of the booms which had been towed on

a river to a sawmill and the guiding of the logs to a conveyor **extending into the river** by which they were drawn into the mill for sawing. Clearly, even if this had any admiralty feature, it had only an "incidental relation to navigation." The rights and obligations of the employees and their employers could well be regulated by "local" law, which would not work material prejudice to the characteristic features of the general maritime law.

In **South Chicago Coal & Dock Co., et al.** v. **Bassett, Deputy Commissioner, United States Employees' Compensation Commission** (1940), 60 Sup. Ct. Rep. 544, this Court held:

> Syl. 1. "The general scheme of the Longshoremen's Compensation Act was to provide compensation to employees engaged in 'maritime employment,' except as stated in the act, for disability or death resulting from injury occurring upon navigable waters of the United States, where recovery through workmen's compensation proceedings might not validly be provided by state law."
>
> Syl. 8. "The purpose of the Longshoremen's Compensation Act was to provide compensation for **a class** of employees that worked on vessels in navigable waters, who although they might be classed as 'seamen' were **regarded as 'distinct** from members of a crew,' being employees whose service was that of laborers of the sort performed by longshoremen and harbor workers as distinguished from those employees on the vessel who were naturally and primarily on board to aid in her navigation.

"The question was required to be determined by the actual duties of the workman." (Syl. 9).

Measured by this test there is absolutely no evidence in the record that the decedent's contract of employment was in maritime or that his duties as "janitor and handy-man" or his instructions required him to go upon or do any work on boats on navigable waters or rivers of any kind.

As was said by the United States Court of Appeals of the District of Columbia, in **Hartford Accident & Indemnity Co. vs. Cardillo,** cited and quoted from on pages 14-16, "to entitle an employee to compensation under the Federal Act, the employees' employment and work had to require him to be in the place of danger and expose him to the risk or hazard—arise out of and in the course of the employment."

In **Fidelity Cas. Co. of N. Y.** v. **Burris,** 59 Fed. (2d) 1042 at 1043, the Court said:

> "(1) It is first insisted that both the lower court and ourselves are bound by the findings of fact of the deputy commissioner, but it is sufficient to say as to this that we have many times held that, upon a review of the record made before the deputy commissioner, out duty is to determine whether his order was or was not in accordance with law, and this depends upon whether the testimony taken before the deputy commissioner will sustain his finding." * * * "As we view the matter, there is no evidence on which to sustain the deputy commissioner's finding."

THIS COURT HAS DECIDED ADVERSELY TO PETITIONER'S CONTENTIONS

In **Crowell** v. **Benson** (1932), 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285, Chief Justice Hughes delivering the opinion, at page 287 said:

> "(1) First. The Act has two limitations that are fundamental. It deals exclusively with compensation in respect of disability or death resulting 'from an injury occurring upon the navigable waters of the United States,' if recovery 'through Workmen's Compensation proceedings may not validly be provided by State law,' and it applies only when the relation of master and servant exists."

Id. Note 1, page 288; L. S. & H. W. Comp. Act 21 (b).
R. 292:

> "The Congress did not attempt to define questions of law, and the generality of the description leaves no doubt of the intention to preserve to the Federal court full authority to pass upon all matters which this Court had held to fall within that category. There is thus no attempt to interfere with, but rather provision is made to facilitate, the exercise by the court of its jurisdiction to deny effect to any administrative finding which is without evidence, or 'contrary to the indisputable character of the evidence,' or where the hearing is 'inadequate,' or 'unfair,' or arbitrary in any respect. **Interstate Commerce Commission** v. **Louisville R. R. Co.**, supra, at pages 91, 92 of 227 U. S., 33 S. Ct. 185; **Tagg Bros. & Moorhead** v. **United States**, supra."

Id. 294-295.

"What has been said thus far relates to the determination of claims of employees 'within the purview of the Act.' A different question is presented where the determinations of fact are fundamental or 'jurisdictional,' in the sense that their existence is a condition precedent to the operation of the statutory scheme. * * *

* * * "In the present instance, the Congress has imposed liability without fault **only where the relation of master and servant exists 'in maritime employment,' and, while we hold that the Congress could do this, the fact of that relation is the pivot of the statute, and, in the absence of any other justification, underlies the constitutionality of the enactment."** * * * "It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, **does not require the conclusion that there is no limitation of their use,** and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the executive department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do de-

pend, upon the facts, and finality as to facts becomes in effect finality in law."
* * *

Id. 296:

"In the present instance, the argument that the Congress has constituted the deputy commissioner a fact-finding tribunal is unavailing, as the contention makes the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved." * * *

Id. 297:

* * * "In the absence of any provision as to the finality of the determination by the deputy commissioner of the 'jurisdictional fact of employment,' the statute is open to the construction that the court in determining whether a compensation order is in accordance with law may determine the fact of employment which underlies the operation of the statute. And, to remove the question as to validity, we think that the statute should be so construed." * * *

"We think that there is a clear distinction between cases where the locality of the injury takes the case out of the admiralty and maritime jurisdiction, or where the fact of employment being absent there is lacking under this statute any basis for the imposition of liability without fault, and those cases which fall within the admiralty and maritime jurisdiction and where the relation of master and servant in maritime employment exists. It is in the latter field that the provisions for compensation apply." * * *

The quotation in the petition, the pages 10-11 from **Crowell** v. **Benson** (pp. 46-47) refers to cases which arise with respect to injuries to employees "within the purview of the Act" and has no application to the instant case and does not support petitioner's contentions. This is shown from the language of the Court in **Crowell** v. **Benson,** 285 U. S. page 46, immediately preceding the quotation, paragraph (4), 52 S. Ct., top of page 291; which language the learned Solicitor General no doubt inadvertently overlooked, which reads:

> "(4) Apart from cases involving constitutional rights to be appropriately enforced by proceedings in court, there can be no doubt that the act contemplates that as to questions of fact, arising with respect to injuries to employees within the purview of the act, the findings of the deputy commissioner, supported by evidence and within the scope of his authority, shall be final."

As pointed out supra, all the evidence shows that the decedent was not an employee within the purview of the Act.

As said in **Crowell** v. **Benson,** at 292 Supra:

> "The Act is made to facilitate the exercise by the Court of its jurisdiction to **deny effect to any administrative finding without evidence,** or, **contrary to the indisputable character of the evidence,** * * * or arbitrary in any respect."

In **Massman Const. v. Bassett, Dep. Comr., et al** (1940), 30 Fed. Supp. 813, the Circuit Court of Appeals said:

> "**The main point urged by plaintiff** in its effort **to set aside the award** of the Federal Commission **is that the United States Employees' Commission was lacking in authority to entertain the claim of defendants, because the deceased was not engaged 'in maritime services' at the time of the accident which resulted in his death.** (One of questions here). (Parenthesis ours).
>
> "(1) **The statute has been interpreted as requiring the Court to make an independent examination of the evidence to ascertain** (1) whether the relation of master and servant existed, and (2) whether the injury occurred upon navigable waters of the United States. **Crowell** vs. **Benson**, 285 U. S. 22, 52 S. Ct. 285, 76 L. Ed. 598; **South Chicago Coal and Dock Co.** v. **Bassett**, 7 Cir., 104 F. 2d 522. **Such a finding is essential to jurisdiction to make any award under the Act.**
> * * *
>
> "Section 903 of the statute provides, in part, that: 'Compensation shall be payable under this chapter in respect of disability or death of an employee, but **only** if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and **if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law.** * * *'
>
> "Section 902 (4) states: 'The term 'employer' means an employer any of whose **employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock.)'**"
> * * *

"(2, 3) The Longshoremen's and Harbor Workers' Compensation Act **was designed to provide for maritime workers** a remedy similar to that provided by state compensation laws. **Crowell** v. **Benson,** supra; **DeWald** v. **Baltimore & Ohio R. Co.,** 4 Cir., 71 F. 2d 810." * * *

"(4) The enactment of this statute rendered ineffectual state compensation laws, in so far as they undertake to provide compensation and **relief to workmen engaged 'in maritime' employment upon navigable waters. Was the deceased so employed?**

"The plaintiff employer had the contract to erect a dam across the Mississippi River" * * * "and was engaged in that undertaking. **The deceased employee at the time of the occurrence was working on that project, and was standing upon the ground in the bottom of the cofferdam in the river.**

"(5-7) **A maritime contract is a contract which relates to the actual business of navigation. A contract for building** a ship or **supplying material** for its construction **is not a maritime contract** for it does not deal with the use of the vessel upon navigable waters. **Roach** v. **Chapman,** 22 How. 129, 16 L. Ed. 294; 2 C. J. S., Admiralty, page 98, Sec. 38. **Agreements to provide mere facilities for navigation are not maritime. Hence plaintiff's contract to build the dam was a matter of local concern and not within the admiralty jurisdiction.**

"(8, 9) **Maritime service has some direct relation to a vessel employed in trade, commerce, or travel upon navigable waters."** * * * "The work of the deceased on the land in a cofferdam was not service performed 'upon navigable waters,' and it was **not maritime** in its nature because it was the design of the project to provide

a nine foot channel as an aid to navigation. The improvement of the channel may aid navigation, so may the building of a ship, **but neither is directly a part of any undertaking to carry on trade, commerce, or transportation upon public waters.** The Sirius, D. C. **65 F,** 226; 38 C. J. 1192.

"In **Grant Smith-Porter Ship Co.** vs. **Rohde,** 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321, 25 A. L. R. 1008, a carpenter employed on a ship nearly completed, launched in navigable water, was not engaged in maritime employment because his service had no direct relation to commerce or navigation.

"In **Miller's Indemnity Underwriters** vs. **Braud** et al, 270 U. S. 59, 46 S. Ct. 194, 70 L. Ed. 470, a diver engaged in removing submerged timber from a navigable river to aid navigation was not employed in maritime service.

"In **Sultan Railway & Timber Co.** v. **Department of Labor, etc.,** 277 U. S. 135, 48 S. Ct. 505, 72 L. Ed. 820, it was held that workmen engaged in assembling saw logs in booms for towage elsewhere were not in maritime employment, but in service of local character and concern.

"In **United States Casualty Co.** v. **Taylor,** 4 Cir. **64,** F. 2d 521, it was determined that a workman engaged in building of a new ship launched but not completed **was not in maritime service and state compensation law applied.**

"In **Jeffers** v. **Foundation Co.,** 2 Cir., 85 F. 2d 24, it was held that a diver employed to help in building a pier of a bridge across the Ohio River injured while standing inside a cofferdam was not entitled to recover under the Longshoremen's Act because he was not upon navigable waters at the time of the accident.

"(10) The cases give expression to the doctrine by which the present controversy must be

determined. **The conclusion to be drawn is (1) that the deceased at the time of his injury was not employed upon navigable waters; (2) that he was not engaged in maritime employment;** (3) and that the Compensation Law of Missouri **validly furnished a mode of redress."**

* * *

"Concluding as we do that Harold Reid Bolting **was not engaged in maritime employment, it follows that the United States Employees' Compensation Commission was without authority to enter the award in question."**

II.

The writ should be denied also because:

The death of decedent did not result from an injury which "arose out of and in the course of his employment."

In **Fazio** vs. **Cardillo,** et al (1940) 109 Fed. (2d) 835, at page 836, the Court of Appeals for the District of Columbia held:

"**Ayers** vs. **Hoage** 63 Fed. (2d) 364, we said 'that an injury **arises out of the employment' when it occurs 'in the course of the employment and as the result of a risk involved in or incidental to the employment or to conditions under which it is required to be performed,** and we added, **that the fact that the injury is contemporaneous or co-incident with employment is not alone a sufficient basis for an award. We adhere to what we said there,** and in this view cases like * * * **Leonbruno** vs. **Champlain Silk Mills,** 229 N. Y. 470, 128 N. E. 711, 13 A. L. R. 522,

(naming them), are either **not** in point or state the doctrine more broadly than we are willing to accept." * * *

"In the instant case the evidence **abundantly** establishes that **appellant's injury** grew out of **'horseplay,'** whether begun by him or Smith, **happened at a time when he had stepped aside from his employment.** * * * Considered in this light, the Deputy Commissioner's finding was correct and is sustained in **Wimmer** vs. **Hoage,** 67 App. D. C. 128, 90 Fed. (2d) 373, and **Morgan** vs. **Hoage,** 63 App. D. C. 355, 72 Fed. (2d) 727; and outside of this jurisdiction by **Edelweiss Gardens** vs. **Industrial Commission,** 290 Ill. 459, 125 N. E. 260; **Scholtzhauer** vs. **C. & L. Lunch Co.,** 223 N. Y. 12, 134 N. E. 701, and **DeFillippis** vs. **Falkenberg,** 170 App. Div. 153, 155 N. Y. S. 761, affirmed 219 N. Y. 581, 114 N. E. 1064."

In the instant case all the evidence shows that decedent, George P. Armistead, Jr., **"stepped aside from his employment"** and **of his own accord and for his gratification was taking a ride in Crown's boat;** and under the Longshoremen's and Harbor Workers' Compensation Act, **awards are subject to the fundamental limitation that an employer is not to be subjected to liability for acts which do not "arise out of and in the course of the employee's employment in maritime." If such act takes him to a place he is not employed, directed, or required to be, this of itself is "outside of and not in the course of his employment,"—DeFillippis** vs. **Falkenberg,** 219 N. Y. 581, 114 N. E. 1064.

In **Morgan** vs. **Hoage** (July, 1934), 72 Fed. (2d) 727, the Deputy Commissioner found that the injury from which Morgan died **did not occur "in the course**

of his employment," and rejected the claim. The Court of Appeals of the District of Columbia, affirming the judgment of the lower court, at page 278 said:

> "In section (2) of the Compensation Act (33 USCA Sec. 902) it is provided: 'The term 'injury' means **accidental injury or death arising out of and in the course of employment.'** In In re McNicol, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306, it is said: **"In order that there may be recovery the injury must both arise out of and also be received in the course of the employment. Neither alone is enough."**

In **Wimmer** vs. **Hoage,** 90 Fed (2d) 373, Wimmer, the claimant, was a salesman in the employ of a motor company the Deputy Commissioner **declined** to award compensation, holding that, **although the injury was sustained while the claimant was in the employ of the employer, claimant failed to prove that it "arose out of the employment."** The case was appealed to the United States Court of Appeals and it affirmed the holding below, and at page 374, said:

> "First. Because, **in leaving the automobile** and * * * **going in search of cigarettes for the personal gratification of himself and his companion, claimant placed himself in a position where the injury he sustained did not arise out of his employment, and this is true because in the circumstances there was wholly lacking a causal connection between the conditions under which the claimant was required and expected to be about the work of his employer and the resulting injury."** * * * "In other words, the injury,

to be compensable, must 'arise out of' a risk connected with the employment **and flowing from it as a rational consequence.** McNichol's Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306. * * *

"But in this case we have no occasion to go farther than to say that if an employee," * * * "leaves the course of his employer's business, even momentarily, and while engaged in a mission of his own is assaulted **either with or without justification, the resulting injury is not covered under the term—injuries arising out of and in the course of his employment."**

In **Hartford Accident and Indemnity Co.** vs. **Cardillo,** (1940), 112 Fed. (2d) 11, the Court of Appeals for the District of Columbia reviewed the evidence and made an "independent determination" for itself and, at pages 13-14 (3-5), held:

"That an employee's employment and work has to require him to be at the place of danger and expose him to the risk or hazard, and that if an injury results therefrom then the injury arises out of and in the course of the employment." Citing **Fidelity & Casualty Co. of N. Y.** vs. **Burris** supra.

The Court there said:"if an employee in the course of his employment has to pass along the public streets and thereby sustains an accident by reason of the risk incident to the street, the accident arises out of as well as in the course of employment. * * * In other words, the work increases the employee's exposure to the risks of the street whenever it requires his presence upon it. * * * The street merely replaces the factory as the working environment. It is not the pe-

culiar nature of the environment or the risk,* * *, but the fact that the work brings the worker within the orbit of whatever danger the environment affords that is important. * * *

"It is stated by Cordozo in **Leonbruno** vs. **Champlain Silk Mills** (1920), 229 N. Y. 470, 128 N. E. 711, 13 A. L. R. 52:

'The claimant was injured not merely while he was in a factory **but because he was in a factory** * * *. Not the particular or peculiar character of the associations and conditions, but that the work creates and surrounds the employee with them is the basic thing. * * * The test of liability is the relation of the service to the injury, the employment to the risk.' * * *

"Not that the act is in the line of duty, or forwards the work, or creates special risks, but that the work brings the employee within its peril makes it, for purposes of compensation, part of the work, * * * brings the claimant within the range of peril by **requiring his presence there when it strikes.**"

In the instant case all the evidence shows that neither the decedent's contract of employment, his orders or directions required him to go upon or do any work on the Crown boat on James River or any other river—nor required his presence at all on the river or at the place at the time he was drowned.

III.

The writ should also be denied, because:

The Motor Boat Sales, Incorporated, Employer, was not engaged in maritime business;—decedent was not employed in maritime employ-

ment; his employment and work were purely of local concern, and might have been validly provided for by State law; nor was he working at all or engaged in doing any work he had been employed, directed or required to do at the time and place he was drowned; he had no duties that took or carried him on to navigable waters.

In **Wimmer** v. **Hoage,** 90 Fed. (2d) 373, The C. C. A. said:

> "It is well settled that **supplying material or equipment to be used in building a boat or ship is not a maritime business or a maritime contract; Ferry Co.** vs. **Beers,** 20 Howard 393, 15 L. Ed. 961; **Roach** vs. **Chapman,** 22 Howard 129, 16 L. Ed. 294; **Edwards** vs. **Elliott,** 21 Wall. 532, 553, 557 22 L. Ed. 487; The Winne Bags, 205 U. S. 354, 363, 27 Sup. Ct. 590, 51 L. Ed. 836."

In **Ferry-Beers** cited supra this Court, at page 961, 15 L. Ed., said:

> "So far from the **contract being purely maritime,** and touching rights and duties appertaining to navigation (on the ocean or elsewhere), it was a contract made on land to be performed on land."

In re Herbert (1933) 283 Mass. 348, 186 N. E. 554, cited supra, the proceeding was to recover compensation under the Massachusetts Workmen's Compensation Act for the claimant, Mildred Herbert, dependent daughter of deceased, **employee working on a scow used by employer to carry garbage over navigable waters. Herbert, the decedent employee, had quarters on the scow and slept there except that**

when it was tied up at Dorchester he usually slept at home. At the time of the accident the scow was tied up at the wharf on Spectacle Island, and Herbert had been seen sweeping the deck of the scow and fell overboard and was drowned in navigable water. Chief Justice Rugg, at page 554, said:

> "Unless the facts bring the case within the exclusive jurisdiction of maritime law, all rights, remedies and obligations of the parties must be determined in accordance with the (state) workmen's compensation act. Young v. Duncan, 218 Mass. 346, 106 N. E. 1." (Parenthesis ours).
>
> * * * "The only point is whether it is permissible to grant relief by that act under the decisions of the United States Supreme Court as to the exclusiveness of admiralty jurisdiction. There is nothing in our own decisions to stand in the way. Gillard's Case, 244 Mass. 47, 138 N. E. 384; Toland's Case 258 Mass. 470, 155 N. E. 602. Doubtless the accident here in question was maritime in nature, at least in some aspects. It occurred upon navigable waters sometimes said to be the test whether it is of admiralty cognizance." (citing cases) * * * "Recent authoritative decisions have laid down the principle however that where facts disclose a situation of mere "local" concern where regulation by State statutes will not materially prejudice essential features of general maritime law, local compensation acts may be operative," Grant Smith-Porter Ship Co. vs. Rohde, supra) and the United States Supreme Court, after reciting the facts, said, "it cannot properly be said that they (employer and employee) consciously contracted with each other in contemplation of the general system of maritime law. * * * Under such circumstances regulation of the rights, obligations and conse-

quent liabilities of the parties, as between themselves, by a 'local rule' would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations. "In **Miller's Indemnity Underwriters** vs. **Braud**, 270 U. S. 59, 46 S. Ct. 194, 70 L. Ed. 470, recovery was permitted under a State workmen's compensation act for the death of a diver who had submerged himself from a floating barge anchored in a navigable river for the purpose of sawing off timbers from an abandoned set of ways which had become an obstacle to navigation. It was said at pages 64-65 of 270 U. S. 36, S. Ct. 194, 195: 'In the cause now under consideration, the record discloses facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend **save for the provisions of the State Compensation Act; but the matter is of mere local concern and its regulation by the State will work no material prejudice to any characteristic feature of the general maritime law.**'"

The Massachusetts Court referred to the case of **Alaska Packers Association** vs. **Industrial Acc. Co.**, 276, U. S. 467, and said:

> "Even if the cause of action was within admiralty jurisdiction, the work was not 'so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law. The work was really 'local' in character.'" ....

The Supreme Court of Mass. then (186 N. E. at 255 in clause 3) said:

> "It seems to us **difficult to conceive of anything more local in its general nature** than sweeping the deck of a scow used in the scavenger business of a great city, moving only when towed and then only a very short distance and within the territorial limits of the municipality. **It does not appear that the deceased had any work directly connected with maritime affairs.** We are of opinion, therefore, that the facts in the case at bar bring it within the principle declared in the decisions of the Supreme Court of the United States already quoted, **to the effect** that the decedent was engaged in a matter of **mere local concern and that its regulation by the compensation act 'will work no material prejudice to any characteristic feature of the general maritime law.'** "

In **Sultan Ry. & Timber Co.** vs. **Department of Labor and Industries,** 277 U. S. 135, "the injuries arose out of **employment on a navigable river in assembling logs in booms for towage,**" the Court said:

> "Recovery was permitted (under the State Act) it being said that 'where **the employment, although maritime in character, pertains to local matter, having only incidental relation to navigation and commerce, the rights,** obligations and liabilities of the parties as between themselves, **may be regulated by local rules** which do not work material prejudice to the characteristic features of general maritime law or interfere with its uniformity.' "

OPINION OF COURT BELOW

The Circuit Court of Appeals of the Fourth Circuit, 116 Fed. (2d) 789-794 at page 790, after careful examination of the record, evidence and cases, held that the decedent's contract of employment was not in maritime; that he was not employed to work on boats or navigable waters, and "had been repeatedly and specifically cautioned and instructed that he was not to get on boats, ride in boats or perform any services on navigable waters," and that he was employed as a "janitor and handy-man," as did the Deputy Commissioner and the District Court; and that his employment was not so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law. Citing Alaska Packers' Ass'n. v. Industrial Accident Comm., 276 U. S. 467, 469, 48 S. Ct. 346, 72 L. Ed. 656, and saying:

> "We are forced to the conclusion that Armistead's employment at the time of his death was strictly local and thus without the scope of the Act."

The fact of Armistead's contract of employment, instructions and directions given him are jurisdictional facts and are essential conditions precedent to the right to make the claim for compensation, and the Deputy Commissioner's determination of those facts is not final, and the Circuit Court of Appeals in determining whether the compensation order and award were in accordance with law, may determine

the jurisdictional facts as to whether the decedent was employed "in maritime employment" and whether the finding and order of the Deputy Commissioner and the judgment of the District Court were in accordance with law. **Crowell** v. **Benson,** supra.

As was said by this Court in **Ferry Co.** vs. **Beers** supra, so it is in the instant case as to Armistead's contract of employment,

> **"So far from the contract being purely maritime and touching rights and duties appertaining to navigation (on the ocean or elsewhere), it was a contract made on land to be performed on land."**

The argument made in note 3, page 7 of the petition, that decedent's "contract of employment, duties and directions, and the "specific instructions" given not to get in boats or go upon or do any work on navigable rivers" could be disregarded by the Deputy Commissioner, it is respectfully submitted, is wholly untenable, and is not supported by any substantial evidence in the record, nor by the decided cases.

The Circuit Court of Appeals rightly held (Op. bot. p. 790) that "the boat corporation did not service boats and did not do repair work on boats, engines or motors on navigable waters," and that the "occasional matters" referred to in note 3 as having been done by other employees did not make or constitute them employees "in maritime employment." Such other employees "rarely" went upon boats on rivers and when they did they went for their own pleasure and at the request of the owners of the boats to make

minor adjustments for such owners, **and not for respondent.** This is shown by all the evidence. (R. 23-25, bot. p. 33-34, 50-51). This did not make them "employees in maritime," nor did it make the decedent an "employee in maritime."

It is respectfully urged that decedent by violating his contract of employment and the directions **"not to go on boats or navigable waters,"** could not change his contract of employment as "janitor and handyman" or enlarge the character and kind of work he was employed, ordered and directed to do.

Nor can a Deputy Commissioner make a contract for and between the employer and employee, and by disregarding all the evidence convert a "non-maritime employee" into a "maritime employee."

It obviously cannot be the law that an employee employed in "non-maritime employment" can convert his employment into "maritime employment" by breaking his contract of employment and violating all his instructions and thereby get drowned on a navigable stream where he was not employed, directed or required to be, and then hold his employer liable for his injury or death.

IV

The petition for writ should also be denied because:

No administrator of the decedent has ever been appointed, and the claim was filed solely by and in the name of Jessie Booker Armistead, his widow, and not by and in the name of the "legal representative" of the decedent as is required by section 5 of the L. S.

& H. W. Comp. Act,—and the proceedings, finding and award of the Deputy Commissioner and the judgment of the District Court and the petition for writ of certiorari by and in the name of the "Deputy Commissioner on his behalf" are void for want of jurisdiction.

Section 5 of the Act creates the "exclusive liability" of the employer, and gives or confers the "right or cause of action" **solely** on the "legal representative"—personal representative—of the deceased employee in admiralty whose death resulted from an injury growing "out of and in the course of his employment in maritime."

If Congress had intended to give the "right or cause of action" to begin the proceedings and to make the "election" and to maintain the action to the widow or any of the named beneficiaries, having named them in section 5 of the Act, it would evidently have so stated and would not **expressly** have conferred it **only** on the "legal representative" of the deceased employee "in maritime."

Section 5 and 23 of the Longshoremen's and Harbor Workers' Compensation Act, were so construed by the Circuit Court of Appeals for the District of Columbia in **Chapman, et al,** vs. **Griffiths-Consumers Co.** (1939), 107 Fed. (2d) 263 at 267, where the Court said:

> **"In this case the action was brought by the employers for themselves, the Insurance Company, and the next of kin under the theory that the Act created in them the right to maintain such action. However,** the declaration fails to aver the pertinent fact which brings them within

> the operation of the statute. **It does not allege facts sufficient to create the assignment of the right of the 'legal representative' to recover damages against a third party as set forth in section 933 (c).**"

The Court accordingly dismissed that suit and held that the action was "void" and could not even be amended by substituting the "legal representative" for the employers, Insurance Company, and the next of kin, a demurrer to the action as brought having been sustained in the lower court.

This Court has so construed a similar statute in **Dennison** vs. **Payne,** 293 Fed. 393 (syl. 4) and at pages 341-343; **Troxell's Admr.** vs. **Del. Lac. and Western R. Co.,** 227 U. S. 586, 57 S. Ct. 586, 57 L. Ed. 537, construing the Federal Employers' Liability Act; **Chicago, R. I. and P. R. Co.** vs. **Schendel,** 270 U. S. 611; **Brown** vs. **Fletcher,** 210 U. S. 82, 52, L. Ed. 966, 28 S. Ct. 702; **Ingersoll** vs. **Coran,** 211 U. S. 335, 53 L. Ed. 208, 29 S. Ct. 92; **American Ry. Co.** vs. **Birch,** 244 U. S. 547, 56 L. Ed. 879.

In **Dennison** vs. **Payne,** supra, at 342, this Court said:

> "The Federal Employers' Liability Act gives the right of action in case of death to one employed in interstate commerce to its personal representative."
>
> Id. 343:
>
> "**In American Railroad Co.** v. **Birch,** supra, * * * the action was brought under the Federal Act by the **widow** and **son** of the decedent, they being the sole beneficiaries, **and not by the administrator. The Supreme Court, however, held that the action could not be maintained,** but

could be brought only in the name of the personal representative, and reversed the judgment.

"This Court denied the contention and held that Congress, doubtless for good reasons, had specifically provided that an action under the Employers' Liability Act could be brought only by the personal representative."

So it is in the instant case. The action could have been brought **only** by and in the name of the "legal representative," as expressly provided in section 5 of the Act.

Further, we have found no authority that authorizes the widow, as she did in the instant case, "to institute the proceeding or assert the right or cause of action in her name, and not in the name of the "legal representative," as is required by section 5 of the Act, nor that authorizes a Deputy Commissioner "on his own behalf," without even the appointment of a "legal representative" under section 5 of the Act to file a petition for writ of certiorari in this Court.

CASES CITED BY PETITIONER

An examination of **Wood Towing Co.** vs. **Parker,** Dep. Comr., 76 Fed. (2d) 770, shows that it is clearly distinguishable from the instant case. There the decedent was "employed to install an engine on a motor boat lying in navigable waters when he met his death." There both his employment and work were maritime and required him to be at the place he was —required him to be on navigable waters. The facts in the instant case are the very reverse of those in

the Wood Towing case. An examination of the other authorities cited in the petition show that they are not similar and are clearly distinguishable from those cited and followed in the Circuit Court of Appeals in the instant case as well as those cited herein.

CONCLUSION

In conclusion it is respectfully submitted that the Circuit Court of Appeals has not rendered a decision in conflict with the decisions of other Circuit Courts of Appeal on the same matter; or in conflict with the general law or weight of authority or Federal law; or in conflict with the applicable decisions of this Court, and has not so far departed from the accepted and usual course of proceedings as to call for an exercise of this Court's power of supervision.

For the foregoing reasons it is respectfully urged that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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